Position Statement of the

Max Planck Institute for Innovation and Competition

on the Proposed Modernisation of European Copyright Rules

PART E

Protection of Press Publications Concerning Digital Uses

(Article 11 COM(2016) 593)

I. Introduction

1. A group of press publishers has recently claimed the right to be acknowledged as holders of neighbouring rights with the aim of tackling the alleged risk of being taken over by new intermediaries (such as content aggregators). These intermediaries would profit from using content while preventing publishers from receiving a market compensation for their productive activities.

2. The position of the publishers in general has been influenced by the *Reprobel* decision of the Court of Justice of the European Union - hereinafter CJEU - (C-572/13, *Hewlett-Packard Belgium SPRL/13 v Reprobel SCRL, Epson Europe BV intervening*). The judgment is worrying from the publishers' perspective in light of possible national reactions to the *Reprobel* decision that might lead to stopping the practice of sharing copyright levies between authors and publishers.

3. In this context, the European Commission from 23 March to 15 June 2016 conducted a consultation on the role of publishers in the copyright value chain and the possible introduction of an EU neighbouring right for publishers. Almost 2,500 responses collected by YouCanFixCopyright (http://youcan.fixcopyright.eu/) expressed the idea that the adoption of a **neighbouring right for publishers** – regardless of the nature of the publisher – would have a **strong negative impact** on all aspects**.** But this fact does not

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emerge from the Commission synopsis report on the results of the public consultation, which does not provide a numerical analysis of respondents "for" and "against" the publishers' neighbouring right. Moreover, there is a reasonable concern that a numerical analysis is difficult to make if lobbying groups try to significantly obscure certain aspects while highlighting others.

4. Indeed, disregarding the consultation results, the Commission launched the proposal of a new neighbouring right for press publishers, which stands alongside the proposal of claims to fair compensation in favour of publishers. These are respectively regulated by Articles 11 and 12 of the Proposal for a Directive on Copyright in the digital single market, COM(2016) 593.

5. The need and the opportunity to introduce a **new neighbouring right** in favour of press publishers will be discussed in this part of the statement, as it is, in the opinion of the Max Planck Institute for Innovation and Competition (hereafter MPI), without any reasonable basis and is extremely **harmful to the public interest**. For reasons that will be outlined below, Article 11 should be removed entirely from the Directive proposal. After that, in part F of this statement, the proposed **claim to fair compensation** in favour of all publishers, which represent a category of derivative rightholders (Article 12), will be examined . This provision has some justifications but, as it stands, it only **increases the risks of fragmentation** within European copyright law. An alternative approach will therefore be brought to the attention of the relevant authorities.

II. The Commission Proposal: Concerns

1. Undefined object of the proposed neighbouring right

6. In the Commission proposal the object of protection – defined in the Impact Assessment (hereinafter IA) as a "*fixation of a collection of literary works of a journalistic nature*" – remains unclear with regard to the term "fixation". In reality, the object of the proposed right is likely **ontologically undefinable**. In the first instance it is the author who "fixes" the work through writing. There-

fore, in the case of literary works a distinction between the work and its "fixation" is hardly feasible, and the work is copyright-protected anyway.

7. Even assuming that "fixation" means arranging a particular layout, the proposed provision misses its mark, since the publisher's layout is not indispensable for the online fruition of such works, as is proved by the fact that third-party online intermediaries – such as search engines and content aggregators – rarely use the publisher's layout. Therefore a new neighbouring right would not prevent digital reproduction and communication to the public of news stories.

8. Furthermore, as far as the publishers' neighbouring right is concerned, the proposed provision does not clarify the protection requirements. This might bring about the paradoxical and unacceptable consequence of always guaranteeing, regardless of the protectability of the work as such, the protection of the neighbouring right in the work published online by the publishers.

2. No economic "rationale" for a press publishers' neighbouring right

9. A clear distinction has to be made between copyright for authors and neighbouring rights. As is clear from the name, the subject matters of protection of "neighbouring rights" are not copyrighted works. "Creativity" or "individuality" is not the precondition for the allocation of a neighbouring right. The economic rationale for copyright law (whatever theory one may follow) does not entirely apply to neighbouring rights. These rights are triggered by specific investments by market players. The production of a sound recording, for instance, requires generally existing proficiency, technical (but common) production facilities and financial resources. *De lege lata* producers of sound recordings dispose of a specific neighbouring right, as do film producers and broadcasters. The rationale of neighbouring rights is based on the economic assumption that without the legal protection provided by neighbouring rights a market failure would occur.

10. There is market failure when third parties can take advantage of goods or services, thereby preventing the party who made the investments in those goods or services itself from reaping an adequate profit. In the case of market failure, investors are guaranteed for a limited period of time an exclusive right allowing them to benefit from their investment.

11. It may be reasonable to assume that new sound recordings as well as films and broadcasts would no longer be produced without a legal protection of the investments that producers or broadcasters make. This is mostly related to the fact that subject matters of neighbouring rights result in perfectly replaceable products, while costs of generating such products (e.g. sound recordings or films) are comparatively high. If third parties were free to (commercially) use such products, the amortisation of costs accrued by the original producer would be impossible. As a result, original producers would give up producing such goods, i.e. sound recordings, films or broadcasts. Consequently, new products would not be generated anymore and the linked markets would fail.

12. The Commission proposal for a new neighbouring right for press publishers – as stated in Article 11 – is based on a situation that is completely different from those mentioned above. The **contribution of press publishers** cannot be taken over by third parties, since "press publications" are "literary works" that are themselves **protected by copyright law.** Even the reproduction of small parts of literary works – namely, the extraction of 11 words – may infringe copyright law (see C-5/08 *Infopaq International A/S v Danske Dagblades Forening*).

13. Thus, looking to the economic rationale of a press publishers' neighbouring right, the comparison with those for producers of sound recordings, films or broadcasts fails from the outset. In fact, a few words extracted from an article can hardly substitute an article as such.

3. Non-substitutive effect of intermediaries' activities

14. Content offered by press publishers is not substitutes by activities of search engines or content aggregators. Quite to the contrary, **search engines and content aggregators** eventually **drive users** seeking content online to the websites of publishers, who then gain economic advantages by selling advertising space and subscriptions. Thus, from the perspective of the market functioning, new intermediaries use publishers' content, granting them a (sort of) consideration. Moreover, aggregators and search engines also affect content quality due to the competition they generate among content websites (For empirical evidence see, e.g., Calzada, Joan and Gil, Ricard, What Do News Aggregators Do? Evidence from Google News in Spain and Germany (September 11, 2016). Available at SSRN: https://ssrn.com/abstract=2837553).

15. Besides, if there really was direct competition in the market between the original sites and the aggregators' press publishers, the publishers could prevent the use of content by intermediary third parties. If publishers wished, **standard robots.txt exclusion protocols** could easily be used by copyright owners to avoid aggregation. Also, on this technical basis there is the option of contractual agreements, including remuneration on a voluntary basis.

4. Hindering the development of new business models

16. Paradoxically, the neighbouring right that the Commission has proposed potentially clashes with the interests of the press publishers themselves, or at least some of them. In the digital environment the role of press publishers has been changing. It is obvious that press publishers are less tied to the printing press and that therefore the publishing business has to be found in **new business models** that are (or in the near future will be) likely based on the use of digital content platforms. Publishers themselves, including press publishers, are in fact developing interactive and multifunctional platforms. The **platform-based distribution** of content can occur in many forms (e.g. integrating journal articles

and book contributions with a particular focus on the information needs of a specific user community). But what is certain is the fact that always or almost always platform-based distribution of content is based on aggregated content databases, including snippets and references or even content fragments from information resources that are available elsewhere.

17. The introduction of the proposed **neighbouring right hampers** these **business models**, which should be incentivised, rather than slowed down. Potentially, press publishers' content platforms might be required to pay remuneration or be prevented from using content due to high transaction costs. These effects clearly damage users' interests. In this respect the distorting potential of press publishers' neighbouring rights has already been seen in the German and Spanish models.

5. Experiences from Germany and Spain

18. Germany and Spain went ahead with two different attempts to protect the interests of press publishers in the digital world. Both ultimately have proven that a neighbouring right has a strong negative impact on publishers' economic interests.

19. The first publishers' neighbouring right (*Leistungsschutzrecht für Presseverleger*) statute in Europe was enacted in Germany in August 2013: Section 87f-g Copyright Act of 9 September 1965 (Federal Law Gazette Part I, p. 1273), as last amended by Section 8 of the Act of 1 October 2013 (Federal Law Gazette Part I, p. 3714). The law, specifically aimed at granting revenues to publishers for news aggregation, attributes an exclusive right to press publishers. According to Section 87f "*[t]he producer of a press product (press publisher) shall have the exclusive right to make the press product or parts thereof available to the public for commercial purposes, unless this pertains to individual words or the smallest of text excerpts […]".* Providing access to press publications re-

mains permissible, as long as the access provider is not a commercial search service or similar entity.

20. This is not the place to detail the many shortcomings of this law (nor comment on its inconsistency with European and international law; see, however, the Position Statement of the Max Planck Institute for Innovation and Competition, "Stellungnahme zum Gesetzesentwurf für eine Ergänzung des Urheberrechtsgesetzes durch ein Leistungsschutzrecht für Verleger", available at www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/leistungsschutzrecht_fuer_verleger_01.pdf). Instead, it is worth pointing out the effects that this law had on the market without reaching the expected results. Indeed, according to a study performed by the Bundesverband Informationswirtschaft, Telekommunication und neue Medien e.V. (Bitkom, 2015, *Ancillary copyright for Publishers – Taking Stock in Germany*), an enforcement attempt by the German collecting society VG Media on behalf of a group of publishers had a negative effect on traffic to the websites of the publishers involved. In particular, reacting to the VG Media claims for licence payments, search engines including Google declined to display snippets from related publishers' products or hid related search results.

21. Thus, if the law shows **effects** at all, they are **negative** – particularly to the detriment of start-ups and small businesses. This right potentially restrains innovative services from offering new forms of providing online access to information. The established legal protection actually left the press publishers more vulnerable than before and at the mercy of huge monopolies. In fact, only big players can afford to negotiate and (if they are willing) to pay for licences.

    Some conclusions can be drawn from the German experience:

    - The new exclusive right promised much more than it could ever deliver.

- It ultimately did not change the situation that existed prior to its enactment – at least not as far as Google (the company mainly targeted) is concerned; its market position was even strengthened.

- Transaction costs for all parties have risen – to the detriment of newcomers and small companies.

- Other search engines than Google now face a potential competitive disadvantage.

22. The Spanish legislature introduced into the Spanish Copyright Act a remuneration right in favour of press publishers for the aggregation of news and other copyrighted content available online by means of a statutory limitation that authorises the aggregation of online content. This "snippet levy provision" was enacted late in 2014 and went into effect on 1 January 2015. Section 32.2 provides that "[*t*]*he making available to the public by providers of digital services of content aggregation of non-significant fragments of content, available in periodical publications or in periodically updated websites and which have an informative purpose, of creation of public opinion or of entertainment, will not require any authorization, without prejudice of the right of the publisher or, as applicable, of other rights owners to receive an equitable compensation. This right will be unwaivable and will be effective through the collective management organizations of intellectual property rights. In any case, the making available to the public of photographic works or ordinary photographs on periodical publications or on periodically updated websites will be subject to authorization*".

23. Unlike its German counterpart, the right is indispensable and has to be administered by the corresponding collective management organisation. Consequently, news publishers may not negotiate over their right to be remunerated – even if they want their content to be available on a more permissible basis, such as a Creative Commons licence or open publishing. Beyond that, unlike the Ger-

man law, the Spanish remuneration right could be interpreted to cover any content online (apart from photographs), not only that of press publishers.

24. The first consequences of this new law, however, go in the opposite direction of what was expected: Google, as probably the most relevant news aggregator, exited the market for Spanish news aggregation, closing down its news.google.es website in December 2014, de-listing links to Spanish news publications in Google search results. But domestic online service providers have also closed down their operations (e.g. Planeta Lúdico, NiagaRank, InfoAliment and Multifriki). Recently the Spanish Association of Publishers of Periodical Publications commissioned NERA Economic Consulting to assess the impact of introducing Section 32.2 into the Spanish Copyright Act. NERA's analysis focuses on the new law's effect on competition, primarily for the news aggregator and publication areas, as well as for consumers and advertisers. The study (NERA Economic Consulting, 2015, *Impacto del Nuevo Artículo 32.2 de la Ley de Propiedad Intelectual Informe para la Asociación Española de Editoriales de Publicaciones Periódicas (AEEPP*)) found that the law has done **substantial damage to the Spanish news industry**. According to this inquiry, "on the more distant horizon, the negative impact will be more significant, discouraging the development of innovative content and platforms in the ecosystem of online news consumption in Spain".

25. These two "case studies" demonstrate the need to analyse more carefully – before introducing such a new exclusive right, that is – whether and under which conditions the lack of a neighbouring right for press publishers leads to a market failure. In any case, the studies have not proven that a new legal instrument in copyright is needed, in particular not in a field of digital business models in which publishers to a large degree are able to take technical measures to protect their economic interests.

6. Inconsistencies with the EU copyright *acquis*

a) Indexing and displaying news and articles

26. The proposed neighbouring right would **not be consistent with the EU copyright *acquis*** to the extent that activities carried out by online intermediaries are not covered by copyright law (i.e. indexing and displaying news and articles).

27. The most important rulings of the CJEU in this respect are the *Svensson* (C-466/12, *Svensson v Retriever Sverige AB*) and GS Media decisions (C-160/15, *GSMedia v Sanoma Media Netherlands BV, Playboy Enterprises International Inc., Britt Geertruida Dekker*). Both cases concern "hyperlinking" redirecting users to online content in which the applicants held the copyright. The CJEU affirmed that setting clickable links to works freely available on another website and published by or with the consent of the rightholder is not an act of "communication to the public". Hyperlinking as such is therefore mostly not covered by copyright law. This is also confirmed by Recital 33 of the proposed Directive.

b) Extracts of articles as copyright subject matter (so-called snippets)

28. Considering the EU *acquis*, Article 11 of the proposed Directive would have a comparatively very narrow scope of application. The CJEU has specifically dealt with headlines and extracts of articles as copyright subject matter (so-called snippets). Particularly in the *Infopaq* decision (C-5/08 *Infopaq International A/S v Danske Dagblades Forening*) the CJEU interpreted the provisions of Directive 2001/29 (InfoSoc Directive) on copyright, pronouncing in particular on the concept of reproduction in part of a work and on the conditions relating to the requirement of the author's consent. The Court emphasises that the **copyright protection extends to parts of a work**, since, as such, they share the originality of the whole work and contain elements which are the expression of the intellectual creation of its author. Therefore, even an act occurring during a data capture process that consists of storing an extract of a protected

work comprising 11 words and printing out that extract falls under the concept of reproduction in part within the meaning of Article 2 of Directive 2001/29.

29. Of course it might precisely be the purpose of the proposed Article 11 to overrule this jurisprudence, narrowing down the freedom to make use of insignificant parts of a work as far as press publishers are concerned. This, however, should be expressly made clear by the Commission, and in any case it ignores the fact that links in many cases already contain the keywords of a headline. If links might no longer be composed in a way to signal where they are heading, the freedom to link would be undermined.

c) "Sui generis" right for databases

30. Press publishers dispose of the "sui generis" right for databases (Directive 1996/9, Database Directive) which with good reason allows some leeway: the extraction of insubstantial parts of a database is explicitly **allowed** under **Article 7(1).** This free space would be **overruled** by proposed Article 11, which is even less justifiable because the "sui generis" right is equally a means to protect investments as the newly envisaged neighbouring right for press publishers.

d) Conflict with relevant interests of authors and users

31. The proposal to introduce a neighbouring right for publishers ignores the decisive role of authors in making content available online. An exclusive right for publishers going against the interests of the party that copyright law primarily protects would in no way be justifiable. There is, however, no clear distinction between the proposed publisher's right and the (existing) author's related rights. This inevitably leads to **conflicts between both parties**. A journalist may have a keen interest in having an article found and linked by a search engine content aggregator. The decision whether this can be done, however, would remain in the publishers' hands if the neighbouring right was exclusively attributed to publishers. Merely pointing out the fact that this right should

not be exercised against the interests of the authors and other rightholders – as stated in the Impact Assessment – does not resolve the conflict of interests. It does not guarantee authors any protection against publishers.

32. Also, it is important to note that according to the wording of the proposed Article 11, even purely private, non-commercial acts of reproduction would fall under this provision. Hence, there is the risk that everyday practices of millions of EU citizens, who browse, download, recommend or share such content, would become illegal.

7. Duration of the right

33. The duration of the proposed right is **pointlessly long**. The neighbouring right established in Germany lasts for one year "only". Considering that newspaper articles lose their value within days, it is obvious that the protection of press publishers would be extended beyond the concerns addressed by the Commission. In particular, independently operated archives would be prohibited from aggregating any content younger than 20 years without the consent of uncountable right holders.

8. Competence of the EU legislature

34. In any case, the introduction of a new neighbouring right for press publishers is justified by the Commission with the argument that "*a free and pluralist press is essential to ensure quality journalism*". This objective is certainly valuable; however it does not fall within the scope of Article 114(1) TFEU (*Internal Market Competence*), on which the Commission bases the whole copyright package. Other measures (outside of copyright law), in contrast – like tax privileges for newspaper publishers or the like – could be taken into account.

9. Conflicts with fundamental rights

35. In view of the above, the incompatibility of the proposed neighbouring right with fundamental rights is evident. In particular, serious consideration must be given to its interference with the **freedom of expression and information** including the freedom and **pluralism of the media** (Article 11 of the Charter of Fundamental Rights of the European Union and Article 10 European Convention on Human Rights), as well as with the **freedom to conduct an online media business** (Article 16 of the Charter of Fundamental Rights of the European Union).

36. Search engines, content aggregators and other content platforms under development allow the public debate to move to a network structure where users can consult, share and comment on a huge variety of different sources. As already pointed out above, new neighbouring rights are likely to prevent this structural change, which reflects the intrinsic nature of the internet. In this sense, the proposed provision would constitute an unjustified copyright-related measure that hampers the users' freedom of information (see CJEU, *McFadden* Case C-484/14, *Tobias McFadden v Sony Music Entertainment Germany GmbH*).

37. At the same time the proposed provision seriously hinders the freedom of online intermediaries to conduct their business. Indeed it has the capability to prevent the development of business models as well as the promotion of innovative technology. In this context, it is important to recall that the EU is under a constitutional obligation to promote technological advance (see Article 3(3) third sentence TEU).

10. Focus on licensing and enforcement

38. If the real issue for publishers relates to licensing and enforcement (e.g. proof of ownership), the European legislature should focus on licensing and enforcement rather than on creating new rights. The legislature could amend Article 5 "Presumption of authorship or ownership" of Directive 2004/48 (En-

forcement Directive) to create a presumption that a press publisher must be regarded as entitled to bring proceedings to enforce the copyright in any item if that publisher's name appears on the news publication in the usual manner.

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